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DEC

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 211.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Petitioner,

—against—

WESTCHESTER SERVICE CORPORATION,

Appellee.

REPLY BRIEF FOR PETITIONER.

ALFRED B. NATHAN,
Counsel for Petitioner.

LOUIS H. MOOS,
BENJAMIN LEWIS,
Of Counsel.

THE COURT PRESS, INC.

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REPLY BRIEF FOR PETITIONER.

Replying to Appellee's Point I.

A.

In view of appellee's failure to demand arbitration, the provisions of the arbitration clause did not bar plaintiff from bringing suit upon the contract.

Under its first point, and elsewhere in its brief, appellee urges that the bringing of this action is in itself a breach of the contract to arbitrate, and a deliberate evasion by petitioner of its promise to submit to arbitration. This contention is without merit. There is no proof in the record that appellee demanded arbitration, or took any affirmative steps towards arbitration, prior to the commencement of the present action.

Until appellee took some affirmative steps, indicative of a desire to arbitrate, petitioner was under no

obligation to submit to arbitration. It was no more the duty of petitioner than that of appellee to seek arbitration. The latter had ample opportunity to demand arbitration, if it had a genuine desire to arbitrate. In the absence of affirmative action by appellee calling for arbitration, the arbitration clause constituted no bar to an action by petitioner upon the contract.

In *Grant* v. *Pratt & Lambert,* 110 App. Div. 867, 869, affd. 186 N. Y. 611, the court, discussing an arbitration clause in the contract said:

> "* * * *the rule is well settled that such a clause is no defense to an action to recover upon a contract in the absence of evidence that before the commencement of the action the defendant took steps for the selection of arbitrators and to perform this arbitration agreement on its part.* As was said in *Smith* v. *Alker* (102 N. Y. 87), in speaking of a point made by the appellant that the dispute between the parties should have been submitted to arbitration under the clause in the contract, 'No evidence was given that the defendant took any steps for their selection. *It was not more the duty of the plaintiff than that of the defendant to do so.*' Certainly in the absence of evidence that the defendant insisted on its right to arbitrate or took some steps to carry out this agreement when the dispute between the parties arose, such a covenant is not a defense to an action to recover the amount due under the contract." (Italics ours.)

Provisions for arbitration, it is well settled, may be waived or abandoned by the agreement or action of the parties (*Matter of Zimmerman* v. *Cohen,* 236 N. Y. 15, 19; *Matter of Bauer-Co.,* 206 App. Div. 423, 426).

In the absence of a demand for arbitration, there is no presumption that either party to the contract desires to arbitrate. In the case at bar, assuming for the sake of argument that an arbitrable issue existed, petitioner was not barred from bringing suit, in view of appellee's failure to demand arbitration.

We find nothing to the contrary in the decision of *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 118, cited at page 16 of appellee's brief. In that case this Court adverted merely to the rule prevailing in New York prior to the enactment of the State Arbitration Act, that an agreement to arbitrate was legal, and damages were recoverable for a breach thereof, citing *Haggart* v. *Morgan*, 5 N. Y. 422. The *Haggart* case, however, sustains petitioner's contention that it was not barred from maintaining the present action. Thus, the court said in that case, at page 427:

> "The motion for a non suit was properly overruled. First, because the agreement to arbitrate only entitled the party to damages, *but was no bar to an action.*" (Italics ours.)

A similar rule prevails in the Federal Courts. In *Aktieselskabet etc.* v. *Rederiaktiebolaget Atlanten*, 250 Fed. 935, 937, affd. 252 U. S. 313, it was said:

> "It is, however, fair to assume from *Hamilton* v. *Home Insurance Co.*, 137 U. S. 370, 11 Sup. Ct. 133, 134 L. Ed. 708, that an agreement like this, which leaves the disposition of the whole matter to arbitration is not a bar to an action in court, even if it may support an action for breach of the agreement. In such a case, when no arbitration has been

> actually begun and expenses incurred, only nominal damages could be recovered. *Munson* v. *Straits Dover SS Co.* (D. C.), 99 Fed. 787."

See also:

Lappe v. *Wilcox,* 14 F. (2d) 861, 862.

In effect, appellee contends that arbitration constitutes a condition precedent to the accrual of any right of action under the contract. The arbitration clause here under consideration, however, is not so framed. In order to bar suit, the clause must provide that no action shall be brought until there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. Since the arbitration clause in the instant case, contains no such provisions, and in view of appellee's failure to demand arbitration, petitioner had an absolute right to bring suit, and in doing so it was not guilty of any evasion of its contract obligations (*Hamilton* v. *Home Ins. Co.,* 137 U. S. 370, 385; *Samuels* v. *Samis,* 124 Misc. 35, 37).

B.

The question of the exclusiveness of the forum and law specified in the arbitration clause, is properly before this Court.

At page 17 of its brief, appellee urges that petitioner's contention that since the parties selected the New York courts, no other court can recognize or give any effect to the arbitration clause, does not seem to be covered by petitioner's specification of errors. Petitioner's contention, however, as recognized by appellee, is inherent in petitioner's first specification

of error, that the court below erred in holding Sec. 3 of the U. S. Arbitration Act authorizes a stay pending arbitration, even though such arbitration must take place beyond the jurisdiction of the Federal Court, and under the law of a different forum (Petition for Writ, p. 16). Under the circumstances, petitioner's contentions concerning the exclusiveness of the forum and law specified in the arbitration clause, are properly before this Court.

C.

Section 3 of the Federal Arbitration Act cannot be considered apart from the other provisions of the Act.

Section 3 of the Federal Arbitration Act cannot be considered, or construed, apart from the other provisions of the Act, as appellee urges at pages 19 and 20 of its brief. Section 3 is an integral part of the Act, and its intent and meaning can be determined only by considering it in the light of the other provisions of the Act.

It is a well settled principle of statutory construction that the legislative intent is to be deduced from a view of the whole and every part of the Statute taken and compared together (*Jones* v. *York County,* 47 F. [2d] 837, 839; *Packard Motor Car Co.* v. *U. S.* 39 F. [2d] 991, 997, cert. den. 51 S. Ct. 27; *Ex Parte Public Nat. Bank,* 278 U. S. 101, 104; *The Metmugel,* 49 F. [2d] 368, 370, cert. den. 283 U. S. 866).

Viewing the Federal Arbitration Act as a whole and comparing the various parts thereof, it is evident that Section 3 was not intended to have a larger scope than Section 4, which is limited in application to agreements that call for arbitration within the jurisdiction of the Federal Courts.

Appellee concedes, at page 18 of its brief, that Section 4 is limited in application. In both Section 3 and Section 4 reference is made to an agreement in writing for arbitration, as furnishing a basis for invoking the court's aid. We are unable to perceive any distinction between the type of agreement referred to in Section 3 and that mentioned in Section 4. Nor is there any ground upon which a distinction can be based.

Since there is no distinction between the arbitration agreements referred to in these two sections, and in view of the fact that Section 4 concededly is limited in application, it follows that Section 3 is subject to the same limitation, and can be invoked only in the case of agreements calling for arbitration within the jurisdiction and under the control of the Federal Courts. As a necessary corollary it follows that a stay under Section 3 may not be granted where the agreement requires arbitration to proceed in another jurisdiction and under another law.

Manifestly, it would be an anomaly if the court, lacking the power to direct arbitration, were held to have power to grant a stay pending arbitration, which is merely an indirect method of enforcing arbitration. In *Marine Transit Corp.* v. *Dreyfus,* 284 U. S. 263, 274, this Court said:

> "* * * it may be observed that section 3 provides for a stay in a pending suit until arbitration has been had in accordance with the terms of the agreement, and *it would be an anomaly if the court could grant such a stay and could not direct the arbitration to proceed* * * *" (Italics ours.)

In the case of an agreement calling for arbitra-

tion in a foreign jurisdiction, application for relief, whether to compel arbitration or obtain a stay, must be made to the tribunal designated by the parties. In *Gilbert* v. *Burnstine,* 255 N. Y. 348, where the parties had agreed to arbitrate at London pursuant to the Arbitration Law of Great Britain, the Court said at page 358:

> "We do say that there was an implied submission to the terms of the act itself, *and to any rules or procedural machinery adopted by competent authority in aid of its provisions.*" (Italics ours.)

A stay of proceedings pending arbitration is part of the procedural machinery established in aid of arbitration. An agreement to arbitrate in a designated forum manifestly constitutes a submission exclusively to the arbitration law of that forum and to the procedural machinery of such forum in aid of arbitration. Consequently, it is improper for any tribunal or forum other than that designated, to apply its procedural machinery at the request of a party who applies to it for relief in defiance of the agreement. Only the tribunal designated by the parties, is competent to grant relief. Hence, the Court below erred in granting appellee's motion for a stay.

Respectfully submitted,

ALFRED B. NATHAN,
Counsel for Petitioner.

LOUIS H. MOSS,
BENJAMIN LEWIS,
Of Counsel.